No. 77-214

In the Supreme Court of the United States

OCTOBER TERM, 1977

C. CLYDE ATKINS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. D) is reported at 556 F. 2d 1028.

JURISDICTION

The judgment of the Court of Claims was entered on May 18, 1977. The petition was filed on August 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether Article III, Section 1, of the Constitution, which provides that federal judges shall receive "a Compensation, which shall not be diminished during their Continuance in Office," requires Congress to increase judicial salaries during periods of inflation.

2. Whether 2 U.S.C. (1970 ed.) 359(1)(B), which until its repeal in 1977 authorized a single House of Congress to disapprove salary changes recommended by the President for certain judicial, legislative, and executive officials, violated the law-making procedures established by Article I, Sections 1 and 7, of the Constitution or otherwise violated the separation of powers established by Articles I, II, and III of the Constitution.

3. Whether 2 U.S.C. (1970 ed.) 359(1)(B) was severable from the remainder of the salary adjustment provisions of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351 *et seq.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Sections 1 and 7, Article II, Section 1, and Article III, Section 1, of the Constitution and pertinent portions of Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*, are set forth at Pet. App. 1a-4a.

STATEMENT

Petitioners are 130 federal circuit and district court judges who brought this action for additional compensation allegedly due them for services since March 15, 1969 (Pet. 3). On that date the salary of circuit judges had been increased 28.8 percent from $33,000 to $42,500, and the salary of district judges had been increased 33 1/3 percent from $30,000 to $40,000. 28 U.S.C. (1964 ed.) 44(d), 135; 2 U.S.C. 358 note.

This increase was the first pay adjustment made pursuant to Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351 *et seq.* ("Salary Act"). The Salary Act established a Commission on Executive, Legislative, and Judicial Salaries composed of nine members,[1] which recommends to the President, once every four years, specific pay rates for federal judges, Congressmen, the Vice President, Cabinet officers, and certain other officials in the Legislative, Executive, and Judicial Branches. 2 U.S.C. (and Supp. V) 356, 357. The Act requires the President, after receiving the Commissions report, to include in the next budget he submits to Congress "his recommendations with respect to the exact rates of pay which he deems advisable, for [specified] offices and positions within the pur-

[1] Three members of the Commission are appointed by the President, and two members each are appointed by the President of the Senate, the Speaker of the House, and the Chief Justice. 2 U.S.C. 352.

view of [the Salary Act]." 2 U.S.C. 358. During the period at issue in this suit, the rates of pay recommended by the President would become effective for the first pay period beginning thirty days after submission of the recommendations, or on a later date specified by the President, unless (1) Congress enacted a statute providing for rates of pay other than those the President has proposed (2 U.S.C. (1970 ed.) 359(1)(A)) or (2) either House of Congress "enacted legislation which specifically disapproves all or part of such recommendations * * *." 2 U.S.C. (1970 ed.) 359(1)(B).

In its first quadrennial report to the President in December 1968, the Commission recommended, *inter alia*, that the salary of circuit judges be increased from $33,000 to $50,000 and that the salary of district judges be increased from $30,000 to $47,500. 115 Cong. Rec. 2690 (1969). The President recommended somewhat lower salary increases to $42,500 for circuit judges and $40,000 for district judges. 34 Fed. Reg. 2241, 2242 (1969). Neither House disapproved the President's recommendations,[2] and they therefore became effective for the first pay period beginning after February 14, 1969. 34 Fed. Reg. 2241 (1969).

[2] The Senate debated extensively a resolution (S. Res. 82, 91st Cong., 1st Sess. (1969)) disapproving all of the pay raises the President had proposed, but it ultimately rejected the resolution by a vote of 47 to 34. 115 Cong. Rec. 2677-2716 (1969). A similar resolution was introduced in the House (H. R. Res. 133, 91st Cong., 1st Sess. (1969)) but was not reported out of committee. 115 Cong. Rec. D40 (1969).

In its second report to the President in June 1973, the Commission recommended increases of approximately 25 percent in legislative, executive, and judicial salaries that would have raised the salary of circuit judges to $53,000 and that of district judges to $50,000. 120 Cong. Rec. 5111 (1974). The President modified this recommendation to provide three annual increases of approximately 7.5 percent each, which by 1976 would have increased circuit judges' salaries to $52,800 and district judges' salaries to $49,700. See H.R. Rep. No. 93-870, 93d Cong., 2d Sess. 3 (1974). The Senate passed a resolution disapproving all of the salary adjustments the President had proposed. 120 Cong. Rec. 5492-5508 (1974).[3]

Salaries of federal judges and other officials have been increased twice since 1974. First, in 1975, pursuant to the Executive Salary Cost-of-Living Adjustment Act, 89 Stat. 421, judicial salaries were increased to $44,600 for circuit judges and $42,000 for district judges. 40 Fed. Reg. 47099 (1975). Second, judicial, legislative, and executive salaries were substantially increased effective the first pay period after February 20, 1977, following the Commission's third quadrennial report under the Salary Act. The President recommended salary in-

[3] A similar resolution disapproving the salary increases proposed by the President was introduced in the House (H.R. Res. 807, 93d Cong., 2d Sess. (1974)) and was reported out of committee. H.R. Rep. No. 93-870, *supra*. No further action was taken on the resolution, however, because of passage of the Senate resolution disapproving the proposed salary increases.

creases to $57,500 (a 28.9 percent increase) for circuit judges and to $54,500 (a 29.8 percent increase) for district judges (42 Fed. Reg. 10297 (1977)), and neither House disapproved the President's recommendations.

On April 12, 1977, the one-House veto provision of the Salary Act was eliminated by Pub. L. 95-19, 91 Stat. 45. The amended act requires both Houses to conduct separate votes upon each Presidential salary recommendation. Only if both Houses approve a recommendation can it become effective.

Petitioners filed the first of the three present consolidated actions in the Court of Claims on February 11, 1976. Invoking the court's jurisdiction under the Tucker Act, 28 U.S.C. 1491, petitioners sought money damages based upon two claims. First, petitioners alleged that the failure of the Legislative and Executive Branches to take action after March 15, 1969, to prevent the purchasing power of their salaries from being diminished by inflation violated Article III, Section 1, of the Constitution, which provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office" (Pet. App. D, p. 2). Second, petitioners contended that the Senate's action disapproving the President's 1974 recommendation pursuant to 2 U.S.C. (1970 ed.) 359(1)(B) was an unconstitutional exercise of executive power reserved to the President by Article II and did not constitute enactment of legislation in accordance with Article I, Sections 1 and 7. The United States, represented by the Department

of Justice, opposed petitioners' claim under the Compensation Clause but agreed with petitioners' contention that 2 U.S.C. (1970 ed.) 359(1)(B) was invalid.[4] The United States contended, however, that the one-House veto provision was not severable from the remainder of the Salary Act and that petitioners therefore could not prevail on their statutory claim whether or not that provision was valid.

The Court of Claims dismissed petitioners' claim under the Compensation Clause.[5] All but one of the judges of the court concluded that that Clause protects against erosion of the purchasing power of judicial salaries only where congressional refusal to increase the dollar amount of the salaries is a discriminatory attack upon the independence of the judiciary (Pet. App. D, pp. 20-36).[6] The court found

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[4] In view of the agreement of petitioners and the Department of Justice that the one-House veto provision was unconstitutional, the Court of Claims invited and received briefs from the Senate and House of Representatives as *amici curiae* supporting the constitutionality of that provision.

[5] As a threshold question, the court below held that the rule of necessity authorized and required the judges of the Court of Claims to decide the case despite their indirect interest in the controversy arising from the fact that their own salaries have been established in the same manner as petitioners' salaries (Pet. App. D, pp. 5-15). Previously, the Court of Claims had certified that question to this Court. In their briefs in this Court, both parties agreed that the judges of the court below were not disqualified. On June 21, 1976, this Court dismissed the certified question. 426 U.S. 944.

[6] Judge Nichols concurred on the ground that *United States* v. *Testan*, 424 U.S. 392, barred jurisdiction in the Court of Claims over petitioners' claim (Pet. App. D, pp. 73-80).

no such discriminatory attack in the present case, and it noted that the salary levels of top-level civil servants and members of Congress also had not been substantially increased during this inflationary period (Pet. App. D, p. 44).

A four-man majority of the Court of Claims also held that the one-House veto provision was constitutional and that the Senate's disapproval of the 1974 pay raise recommended by the President therefore was valid. The court concluded that the provision permitting one House to "enact legislation" disapproving any pay raises recommended by the President did not violate the principles of bicameralism and presidential participation in law-making set forth in Article I, Section 7, of the Constitution because, in the court's view, the statutory scheme of the Salary Act was not significantly different from a statute calling for the President to recommend new legislation increasing salaries that would not become effective in the event one House failed to approve it (Pet. App. D, pp. 55-63). The court also concluded that the one-House veto provision did not encroach upon executive powers under Article II or otherwise violate separation-of-powers principles (Pet. App. D, pp. 63-72).

Three judges dissented on the ground that in their view the one-House veto provision was unconstitutional, that it was severable from the remainder of the Salary Act, and that petitioners therefore were entitled to the difference between the salary levels recommended by the President in 1974 and the sal-

aries actually received from March 1974 to March 1977 (Pet. App. D, pp. 80-112).

ARGUMENT

The Court of Claims correctly rejected petitioners' claim based upon the Compensation Clause, Article III, Section 1. Although we agree with petitioners and the dissenting judges below that the one-House veto provision of the Salary Act was unconstitutional, there is no occasion for the Court to reach that issue in this case. The legislative history of the Salary Act demonstrates that Congress did not intend to confer upon the President and the Commission final authority to change the salaries of federal judges, members of Congress, and top-level executive officials without subsequent veto power by either House of Congress. Accordingly, as the Fourth Circuit recently held in *McCorkle* v. *United States*, 559 F.2d 1258, petition for certiorari filed September 28, 1977 (No. 77-486), the one-House veto provision was not severable from the remainder of the pay adjustment provisions of the Salary Act, and petitioners therefore would not be entitled to the 1974 recommended salary increase regardless whether that provision was valid. Moreover, the one-House veto provision challenged here has been eliminated from the Salary Act.

1. The Court of Claims correctly rejected petitioners' claim that the failure to increase their salaries

by more than 5 percent between 1969 and 1976 violates the Compensation Clause.

Petitioners contend that the constitutional requirement that judges receive "a Compensation, which shall not be diminished during their Continuance in Office" does not protect merely the dollar amount of their salaries but also "offers *some* protection for a judge's real compensation," *i.e.*, the purchasing power of that salary as measured by the Consumer Price Index (Pet. 21; emphasis in original).[7] The history of the Compensation Clause, however, plainly shows that the Founders used "Compensation" in its ordinary sense, *i.e.*, salary payable in legal tender, not in the manner petitioners urge. Indeed, during the Con-

[7] Petitioners do not argue, however, that judicial salaries must be adjusted "with every jog in the Consumer Price Index," but only that their salaries must be adjusted "from time to time so that there is no serious decline over a period of years" and so that adjustments in governmental salaries do not discriminate against judges (Pet. 25-26). Such a standard would present substantial difficulties to courts in selecting, *inter alia*, the appropriate basis from which and period during which to measure the adequacy of adjustments in judicial salaries. For example, petitioners have selected the period from March 1969 (immediately after the 1969 salary increase) to early 1976 (before the 1977 salary increase) (Pet. 3). During this period the CPI rose more than 52 percent while judicial salaries rose less than 5 percent. A far different comparison emerges if the relevant period is extended from February 1969 to March 1977. During this period, the salary of district judges increased 81.7 percent (from $30,000 to $54,500) and the salary of circuit judges increased 74.2 percent (from $33,000 to $57,500), while the CPI increased 66.4 percent. See Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review* 77 (September 1977).

stitutional Convention, Madison supported a proposal that would have prohibited increases, as well as decreases, in judicial compensation. 2 Farrand, *The Records of the Federal Convention of 1787* 44-45 (1966). To guard against "[t]he variations in the value of money," Madison suggested "taking for a standard wheat or some other thing of permanent value." *Id.* at 45. Although acutely conscious of the problem of inflation, the Convention twice rejected Madison's plan and adopted instead the present Compensation Clause, thus manifesting an intent to provide judges with compensation in its common and ordinary form, *i.e.*, a salary, measured in currency, which Congress can increase as "regulated by the manners [and] the style of living in [the] Country." *Id.* at 45; see also *id.* at 429-430.[8]

In explaining the Compensation Clause, Hamilton also indicated that the effect of inflation upon judicial salaries was a matter to be resolved by legislative discretion, not by a self-executing constitutional command (*The Federalist* No. 79, pp. 497-498 (Wright ed., 1961)):

> It will readily be understood that the fluctuations in the value of money and in the state of society

[8] The first judicial salary provision, 1 Stat. 72 (1789), also equated "compensation" with a monetary salary by providing, "That there shall be allowed to the judges of the Supreme and other courts of the United States, the yearly compensations herein after mentioned, to wit: to the Chief Justice four thousand dollars * * *." No provision was made for cost-of-living adjustments or for periodic review of the adequacy of the salaries specified.

> rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. [9]

As decisions of this Court reflect, the purpose of the Compensation Clause was not to entitle judges to compensation free from the effects of inflation but to protect judges from attacks on their independence through discriminatory reductions of their salaries. Thus, in *O'Malley* v. *Woodrough*, 307 U.S. 277, this Court held that applying a general income tax to the incomes of judges did not violate the Compen-

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[9] This view apparently was shared by the judges of the Virginia Court of Appeals, who in 1788 voiced their objection to a Virginia statute that purported to increase their duties substantially without any increase in remuneration. *Judges' Case*, 8 Va. (4 Call) 135. The judges considered the increase in duties to violate the state constitution, but they took a different view of payment of their salaries in inflated paper money (*id.* at 145):

> The various substitutions of paper money and tobacco for specie, which was not to be had, the judges considered as temporary expedients, which, though operating greatly to the diminution of their salaries, were not designed to affect their independence, and therefore they acquiesced, content to share in the public calamities, in hopes of a recurrence to the constitutional principle in better times.

sation Clause. The Court reaffirmed the proposition, recognized in *Evans* v. *Gore*, 253 U.S. 245, and *Miles* v. *Graham*, 268 U.S. 501, that the purpose of the Compensation Clause was to protect the independence of the judiciary, but it overruled those decisions in so far as they held that the Clause prohibited Congress from imposing a non-discriminatory tax upon the incomes of judges. In *O'Malley*, the Court stated (307 U.S. at 282):

> To subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government * * *.

The court below correctly concluded that those principles foreclose petitioners' claims under the Compensation Clause. As the court stated (Pet. App. D, p. 29):

> *O'Malley* rejected the contention that a diminution of purchasing power by virtue of income taxation violated the Compensation Clause, stating that an economic burden placed nondiscriminatorily on the public generally afforded judges no cause to complain under the Constitution. Inflation generally experienced by the public is just such a nondiscriminatory burden.

Congressional action with respect to judicial salaries fully supports the Court of Claims' conclusion that the delay in raising judicial salaries between 1969 and 1976 was nondiscriminatory with respect

to judges and cannot be regarded as an attack on the independence of the judiciary. First, there is no *a priori* basis for petitioners' selection of that particular period; if a slightly different period had been selected, judicial salary increases would have been shown to have exceeded the rate of inflation (see note 7, *supra*). Moreover, as the Court of Claims noted (Pet. App. D, pp. 41-47), judicial salaries have traditionally been linked to the amount Congress pays its own Members and top-level executive officials, and in 1974 Congress declined to increase such salaries.[10] Finally, the recent substantial salary increases under the Salary Act now provide petitioners compensation that they do not claim is inadequate, thus confirming that there has been no assault on judicial independence by means of salary actions.

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[10] The legislative history of the Senate's disapproval of the recommended salary increases in 1974 provides no evidence of any hostility to the judiciary. See S. Rep. No. 93-701, 93d Cong., 2d Sess. (1974); 120 Cong. Rec. 5492-5508 (1974).

Petitioners argue that the refusal to increase judicial salaries was discriminatory because the salaries of GS 16 to 18 employees increased 48.9 percent between 1969 and 1976 (Pet. 27). In fact, however, the ceiling established by 5 U.S.C. 5308 caused marked differences in the increases for these employees. For example, between the July 1, 1969, pay raise and 1976, the salary of a GS 16, step 1, employee increased 45.1 percent, from $25,044 to $36,338, while the salary of a GS 18, step 1, employee increased only 12.9 percent, from $33,495 to the $37,800 ceiling. See Exec. Order No. 11474, 34 Fed. Reg. 9605 (1969); Exec. Order No. 11883, 40 Fed. Reg. 47091, 47092 (1975).

2. We concur with petitioners and the dissenting judges below (Pet. App. D, pp. 80-92) that the one-House veto provision of 2 U.S.C. (1970 ed.) 359(1)(B) was invalid. This provision was, before its repeal, one of a large number of similar provisions in federal legislation that purport to give both Houses, one House, or committees thereof, veto power over actions lawfully taken by the President pursuant to statute.[11] Such provisions have been opposed on constitutional grounds by every President since President Hoover,[12] and a clear judicial resolution of the con-

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[11] See generally Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983 (1975). While the first legislative veto provision of which we are aware was enacted in a 1932 executive reorganization statute, Act of June 30, 1932, Section 407, 47 Stat. 414, it is only in the last decade that such enactments have become relatively frequent. The most sweeping proposal introduced recently, which was defeated by a narrow margin, was a bill to amend the Administrative Procedure Act to provide that every agency regulation could go into effect only after being submitted to Congress and not disapproved by either House. H.R. 12048, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. H10666-H10690, H10718-H10719 (daily ed., September 21, 1976).

[12] See Watson, *supra*, 63 Cal. L. Rev. at 988, n. 9. In January 1977 the present Attorney General expressed the opinion that the one-House veto provision contained in the executive reorganization statute, 5 U.S.C. 906(a), was constitutional, but his opinion was expressly limited to the unique nature of that statute. Unlike the situation presented under most statutes, including the Salary Act, a reorganization plan submitted by the President under that statute has no effect on any individual's legal rights or obligations, and a veto of such a plan by one House does not change the legal rights or status that any individual would have in the absence of that House's action. For that reason, it may be appropriate to

stitutional issue is of the utmost importance.[13]

In brief, we contend that 2 U.S.C. (1970 ed.) 359 (1)(B), which permitted a single House of Congress to change what otherwise would be legally effective through what purported to be legislation, violated the law-making procedures set forth in Article I, Sections 1 and 7, of the Constitution and the basic principles of bicameralism and the presidential role in legislation established by those constitutional provisions. Moreover, we submit that the majority of the court below erred in attempting to analogize the operation of a one-House veto under the Salary Act to a con-

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conclude that a veto by one House is sufficiently equivalent to the ordinary situation in which one House refuses to pass legislation proposed by the President to survive constitutional challenge. Apart from that narrow exception, President Carter, like other Presidents, has expressed "serious constitutional reservations" and his "intention to preserve the constitutional authority of the President" with respect to such provisions. See 13 Weekly Comp. of Pres. Docs. 1128-1129, 1185-1186 (July 28 and August 5, 1977).

[13] The decision below is the only decision to date that squarely reaches the issue. Other decisions involving one-House veto provisions have declined on various grounds to reach the question of their constitutionality. See *Buckley* v. *Valeo*, 424 U.S. 1, 140 n. 176; *Clark* v. *Valeo*, 559 F. 2d 642 (C.A. D.C.), affirmed *sub nom. Clark* v. *Kimmitt*, No. 76-1105 (June 6, 1977); *McCorkle* v. *United States, supra.* The issue of the constitutionality of a one-House veto in the Immigration and Nationality Act, 66 Stat. 214, as amended, 8 U.S.C. 1254(c)(2), is currently pending in *Chadha* v. *Immigration and Naturalization Service*, C.A. 9, No. 77-1702.

stitutionally permissible statutory scheme.[14] Such an analysis ignores the fact that the one-House veto provision, in reversing the law-making, law-executing order established by the Constitution, was not a change in form only but has a substantial and fundamental impact on the system of government envisioned by the Founders. See generally Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1396 (1977). Moreover, the statute at issue here and similar provisions have substantially encroached upon the constitutional functions of the President, and in many cases of the judiciary as well, in violation of the separation of powers inherent in Articles I, II, and III.

3. Notwithstanding the importance of the issue generally, there is no occasion for the Court to consider the validity of former 2 U.S.C. (1970 ed.) 359 (1)(B) in this case. We submit that the Fourth Circuit in *McCorkle* v. *United States, supra*, correctly concluded that the legislative history of that statute demonstrates that the one-House veto provision was crucial to Congress' assent to the Salary Act of 1967 and therefore is not severable from the remainder of the Act. Accordingly, if former 2 U.S.C. (1970 ed.) 359(1)(B) was unconstitutional, the en-

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[14] Because almost every statute contains some delegation of authority to the Executive, and could be recast in a form providing for more or less delegation, the conceptual approach suggested by the Court of Claims would place virtually no limits on Congress' power to subvert Article I's principles of bicameralism and the presidential role in the legislative process.

tire Salary Act would be invalid, and petitioners would have no claim under the Act.

Although the dissenting judges in the court below came to the contrary conclusion with respect to severability (Pet. App. D, pp. 92-105), those judges and the court in *McCorkle* are in agreement on the controlling legal principle, which, as this Court stated in *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 234, is whether the legislature would "have enacted those provisions which are within its power, independently of that which is not * * *." Moreover, the dissenting judges below did not dispute the proposition stated by the court in *McCorkle* (559 F.2d at 1261), that "[w]hen the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent. See *Davis* v. *Wallace*, 257 U.S. 478, 484 (1922)." Accordingly, the issue here involves only the application of settled principles to the particular circumstances and legislative history of the Salary Act of 1967.

The salient feature of that legislative history, outlined at length in the opinion in *McCorkle* but largely ignored by the dissenters below, was the extreme reluctance of Congress, and particularly of the Senate, to delegate salary-making authority to the President. Thus, in response to the charges that the bill was an unwarranted delegation of power to the President, the sponsor of the bill in the House repeatedly emphasized that the one-House veto provision allowed Congress

to retain final authority with respect to federal salaries. 113 Cong. Rec. 28642-28643 (1967) (remarks of Representative Udall); 113 Cong. Rec. 28644 (1967) (remarks of Representative Holifield). The Senate Post Office and Civil Service Committee struck all of the provisions delegating authority with respect to federal salaries, explaining, "[t]he committee is unanimously opposed to any legislative proposal which would vest in the executive branch the authority to establish, affirmatively or negatively, the salaries of the Members of Congress." S. Rep. No. 801, 90th Cong., 1st Sess. 25 (1967). The Conference Committee restored these provisions, but proponents of the bill in both the House and the Senate again stressed that the one-House veto provision retained for Congress the ultimate authority over federal salaries. Thus, Senator Monroney, the Senate Floor manager, explained (113 Cong. Rec. 36108 (1967)):

> If the [Senate] does not like [the salaries recommended by the President], a majority of one in either body can veto that plan and Congress can fix those salaries legislatively. We have not surrendered any power. We have the right to exercise that power whenever such a plan does not meet the consensus of a majority of one in either House.
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> * * * * *
>
> Either House, by a majority of one, can reject or modify the plan. So the power rests with the congressional branch.

See also 113 Cong. Rec. 35839 (1967) (remarks of Congressman Udall).[15]

Finally, the Salary Act contains no severability clause. Whether or not that fact establishes a presumption of nonseverability, it certainly negates any presumption in favor of severability and confirms, we submit, that Congress in 1967 had no intention of delegating salary-making authority to the President without the subsequent control that the provision for legislative veto gave to each House.

4. The one-House veto provision at issue here was repealed this year, and thus the issue of its validity has no prospective importance except as the principles involved are important to other similar provisions. We believe that this Court should not decide an issue of major constitutional importance in a context that would be largely advisory with respect to the particular statute involved.

[15] The dissenters below dismissed most of these remarks as primarily reflecting concern about delegating authority to the President to establish congressional salaries (Pet. App. D, p. 101). Whether or not that was so, the one-House veto provision made no distinction between congressional and other salaries, and there is no basis for concluding that it is nonseverable, and renders the entire Act invalid, with respect to congressional salaries, but is severable with respect to all other salaries.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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